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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 501 .

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
of 110 William Street, New York City,
Petitioner,

—against—

PAULINE CASALINO.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND FOR STAY OF EXECUTION OF JUDGMENT.

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THE COURT PRESS, N. Y. C.

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2. The decision of the lower Court permits the owner of a non-provable claim to share the assets with creditors who have sustained pecuniary loss, which is contrary to the intent of Congress 6

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5. The importance of the decision sought to be reversed may be seen from the motion of the Excise Bond Underwriters and its twenty-eight member insurance companies, made at the same time as this petition. These insurance companies write insurance in practically every other state in the union and, since a great many of such states have alcoholic control laws, the losses referred to of these insurance companies are multiplied. Besides, there are numerous other companies writing excise bonds throughout the country affected directly by this decision 9

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—against—

PAULINE CASALINO.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK AND FOR STAY OF EXECUTION OF JUDGMENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner prays that a writ of certiorari be issued to review the final order and judgment of the Court of Appeals of the State of New York (fols. 133-143) rendered on October 19, 1950 (upon which a final order was entered in the office of the Clerk of the County of New York on the 31st day of October, 1950), which affirmed a judgment of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department, entered on the 10th day of March, 1950 (fols. 124-126), affirming a judgment of Special Term of the Supreme Court of the State of New York, New York County, entered on

the 17th day of November, 1949 (fols. 10-17). Petitioner prays further that the execution of said judgment be stayed pending this review by this Court.

Opinions of the State Court.

Special Term rendered an opinion on an order granting the motion of Pauline Casalino to cancel and discharge a judgment previously entered in favor of the petitioner (fols. 14-17). The Appellate Division of the Supreme Court of the State of New York, First Judicial Department, and the Court of Appeals of the State of New York rendered no opinion.

Jurisdiction.

The jurisdiction of this Court is invoked under the Judicial Code, Title 28, U. S. C. A., Sections 1257, 2104 and 2106.

Question Presented.

The question presented is whether a penalty due the State of New York not provable in bankruptcy (Title XI, U. S. C. A., Section 93J) may become a judgment provable in bankruptcy in the hands of a subrogated surety.

Statutes Involved.

The pertinent statutory provisions are set forth in Appendix A to this petition.

The Manner in Which the Federal Questions Sought to Be Reviewed Were Raised in the State Courts.

At Special Term of the Supreme Court of New York County, the defendant moved to vacate a judgment in favor of petitioner on the ground that the defendant had been discharged in bankruptcy (fols. 18-36, 104-108).

Petitioner opposed the motion on the ground that the judgment was not provable in bankruptcy (Title XI, U. S. C. A., Section 93J) (fols. 37-102).

The motion was granted and the Court rendered an opinion stating that the judgment was dischargeable in bankruptcy (fols. 14-17). See Appendix B to this petition.

The only question involved was a federal one, namely: Was the judgment dischargeable in bankruptcy?

Appeals followed to the Appellate Division, First Department and to the Court of Appeals, and both courts unanimously affirmed without opinion.

The amended remittitur issued by the Court of Appeals states that the federal questions here sought to be raised were considered by that Court (fols. 140-143).

Statement of Facts.

On July 1, 1934, Pauline Casalino procured a liquor license from the New York State Liquor Authority and posted a surety bond in the penal sum of $1,000 obtained from the Hartford Accident & Indemnity Company, the petitioner herein (fols. 23-24).

Thereafter, Pauline Casalino was charged with a violation of Section 108 of the Alcoholic Beverage Control Law and, after a hearing before the Alcoholic Beverage Control Board, on May 14, 1935 her license was revoked and her bond forfeited (fols. 61-64).

On October 8, 1935, demand was made on the surety for payment of the sum of $1,000, the penal sum provided for in the said bond (fols. 65-68), and on May 18, 1936 the said sum was paid by the surety to the State (fols. 70-72).

Suit was commenced against Pauline Casalino for the recovery of said sum and on September 3, 1936 judgment was entered in favor of the Hartford Accident & Indemnity Company in the New York County Clerk's Office for $1,017.50 (fols. 24-25).

In 1942, Pauline Casalino filed a voluntary petition in bankruptcy listing the judgment of the Hartford Accident & Indemnity Company, and on August 11, 1942 she was discharged "from all debts and claims which are made provable by said Act against her estate, except such debts as are by said Act excepted from the operation of a discharge in bankruptcy" (fols. 27, 30-33).

On the basis of her discharge in bankruptcy, on October 1, 1949 Pauline Casalino moved to cancel the judgment of the surety and as previously stated the motion was granted (fols. 18-21, 14-17).

Reasons for Granting the Writ.

1. The decision of the lower Court is contradictory to the decision of this Court in *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549, and a decision of the United States Court of Appeals, Second Circuit, in *In re Miller*, 105 Fed. 2nd 926.

Title XI, U. S. C. A., Section 35, provides that only provable debts are discharged in bankruptcy. The claim of The People of the State of New York, being for a penalty, would not have been provable in bankruptcy and, therefore, was not affected by the discharge (*In re Abramson*, 210 Fed. 878; *Matter of Abelove*, 138 Misc. 242). The judgment creditor, on paying to The People of the State of New York the amount of the forfeited bond, became subrogated to the People's rights, under the doctrine of subrogation (*U. S. F. & G.* v. *Carnegie Trust Co., No. 2*, 161 App. Div. 429, 432, aff'd on opinion below, 213 N. Y. 629; see also, to the same effect, 60 C. J. at pp. 777, 702). The judgment creditor did not by subrogation acquire any greater rights than the People, whose claim it paid (60 C. J. 751), and if the People could not prove their claim neither could the judgment creditor.

Nor was the claim of the judgment creditor provable on the theory that the latter possessed a claim against the bankrupt for reimbursement based upon an express agreement in indemnity. In every case where a surety makes payment there is an agreement to indemnify, either express or implied. As the United States Court of Appeals, Second Circuit, said in the

Matter of Miller, 105 Fed. 2nd 926, at p. 929, in discussing *Williams* v. *U. S. F. & G. Co.*, 236 U. S. 549:

> "True, the bankrupt there had entered into a specific contract of indemnity, but the court states that this was no more than would have been implied under the circumstances."

To hold that a surety paying a claim possessed a claim against the bankrupt on the latter's indemnity agreement in addition to a claim as subrogee would give the surety in most cases two provable claims. That this would not be desirable was indicated in *Matter of Miller* (*supra*, at p. 929), where the Court said:

> "By such proof ample protection is accorded the surety without the danger of double proof."

The Court took the view that "a person secondarily liable proves only in the right of the creditor, not upon an agreement, express or implied, of indemnity," a doctrine "generally supported by commentators."

It follows that the only claim which the judgment creditor had against the bankrupt was as subrogee of the People's claim, and that, since the People had no right to prove their claim, the judgment creditor, as subrogee, was subject to the same disability.

2. The decision of the lower Court permits the owner of a non-provable claim to share the assets with creditors who have sustained pecuniary loss, which is contrary to the intent of Congress.

Congress specifically excluded penalties and forfeitures as provable claims (Title XI, U. S. C. A., Section 93J). The refusal of Congress to sanction

proof of such claims is based on the fact that these exactions are intended to punish the bankrupt, and allowing proof of such claims would punish only creditors and would relieve a criminal bankrupt of the burden of his wrongdoing. (*In re Abramson*, 2nd Circuit, 210 Fed. 878, at p. 880; *In re Shawsheen Dairy* (1942), 47 Fed. Supp. 494, 51 A. B. R. (N. S.) 347; *In re Mead-Haskell*, 47 Fed. Supp. 997.)

A state which claims a penalty should not be permitted to share assets with creditors, or the estate may be wiped out not by debts but by penalties. (*In re Birch*, 89 Fed. Supp. 249.)

The surety has no greater rights than the State.

3. A decision of the highest state court perpetually enjoining a judgment creditor on the ground of a discharge in bankruptcy raises a federal question which may be reviewed by this Court.

Palmer v. *Hussey*, 119 U. S. 96.

The merger of the original debt or obligation into a judgment does not take away the power of the bankrupt court to inquire into its provability (*Woodruff* v. *Heiser*, 10th Circuit, 150 Fed. 2nd 869, at page 870). This principle of law is cited and approved in *Heiser* v. *Woodruff*, 327 U. S. 726. Nor does the judgment have the effect of bringing the claim within the operation of a discharge in bankruptcy (*Gilchrist* v. *Cotton*, 148 N. E. 435; *Dunbar* v. *Dunbar*, 190 U. S. 340). Nor is a judgment on a penalty a *debt* within the meaning of the Bankruptcy Act (*Boynton* v. *Ball*, 121 U. S. 457; see also *Audubon* v. *Shufeldi*, 181 U. S. 577).

4. The decision of the lower Court is at variance with previous decisions of the highest court of the State of New York.

The Court of Appeals of New York has held firm in supporting the right of subrogation, referring to it as "the mode which equity adopts to compel the ultimate payment of a debt by one who in justice, equity and good conscience ought to pay it." *Arnold* v. *Green*, 116 N. Y. 566, 571; and in *Pittsburgh Westmoreland Coal Co.* v. *Kerr*, 220 N. Y. 137, it speaks of subrogation as "not founded upon contract nor upon the absence of contract but * * * upon principles of natural justice"; and again in *Pease* v. *Egan*, 131 N. Y. 262, 272, "no contract is necessary upon which to base the right (of subrogation) for it is founded upon principles of equity and benevolence * * *". In *Banca Commerciale Italiana Trust Co.* v. *Clarkson*, 274 N. Y. 69, the Court has allowed the subrogated surety to sue in the name of its insured on the theory that the insured is a trustee of an express trust, and has permitted a surety to punish a defaulting fiduciary for contempt of court. *Townsend* v. *Whitney*, 75 N. Y. 425; *People* v. *Sheriff*, 254 N. Y. 527.

The decision, to the extent that it constitutes an attack on the surety's right of subrogation, is at variance with the letter and the spirit of the foregoing cases.

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5. The importance of the decision sought to b
versed may be seen from the motion of the Excise
Underwriters and its twenty-eight member insurance
panies, made at the same time as this petition. Ma
insurance companies write insurance in practically
other state in the union and, since a great many of
states have alcoholic control laws, the losses refer
of these insurance companies are multiplied. Be
there are numerous other companies writing excise b
throughout the country affected directly by this deci

Conclusion.

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For the foregoing reasons, it is respectfully pra
that this petition for a writ of certiorari be gra
and that execution of the judgment appealed fro
stayed pending its review by this Court.

Respectfully submitted,

KERMAN,
Petitioner.

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